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IN THE

Supreme Court of the United States

October Term, 1958.

No. 177.

HARRY J. ALKER, JR.,

Petitioner,

v.

ESTATE OF GEORGE RENTSCHLER, Deceased,

Respondent.

~~MOTION AND~~ BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

~~MOTION AND~~ BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent moves that the petition for writ of certiorari be denied on the following grounds: first, petitioner failed to set up or claim specifically the alleged violation of the Fourteenth Amendment to the Constitution of the United States seasonably in the Pennsylvania courts; second, there has not been any statute of the Commonwealth of Pennsylvania drawn in question on the basis of its repugnance to the Constitution of the United States; and third, no substantial federal question has been presented.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania in the instant case is reported as *Estate of George W. Rentschler, Deceased*, 392 Pa. 46, 139 A. 2d 901 (1958). An

unreported per curiam opinion of the Supreme Court of Pennsylvania, filed on March 17, 1958, and an order of April 15, 1958, denying petitioner's motion for a reargument before that Court are printed as "Appendix A" hereto, page 25, *infra*.

The opinions and orders of the Orphans' Court of Philadelphia are reported as *Estate of George W. Reutschler, Deceased*, in 11 Pa. D. & C. 2d at 357 and 11 Pa. D. & C. 2d at 372 (1957). These two opinions in toto are part of the transcript of the record filed by petitioner pursuant to Rule 21(1) of the Supreme Court of the United States at pages (R. 157a) and (R. 179a) respectively of said transcript.

JURISDICTION.

Petitioner relies exclusively on the Act of June 24, 1948 c. 646, 62 Stat. 869, 28 USC Section 1257(3) as the basis for jurisdiction of the Supreme Court of the United States.

This Court should refuse jurisdiction by way of certiorari for the following reasons: first, no federal question of substance has been presented; second, petitioner failed to set up or claim specifically the alleged violation of the Fourteenth Amendment to the United States Constitution in the Orphans' Court of Philadelphia, the court in which the matter was tried, or in the Supreme Court of Pennsylvania prior to the filing of a petition for reargument in that Court after it had ruled adversely to petitioner by affirming the judgment of the Orphans' Court; third, the validity of a state statute was not drawn in question on the ground of its repugnance to the Constitution of the United States, and for that reason there was no decision in the Orphans' Court of Philadelphia or in the Supreme Court of Pennsylvania involving the constitutional validity of a state statute.

STATUTE INVOLVED.

There is no statute involved in the present case which petitioner has ever alleged to be repugnant to the Fourteenth Amendment to the Constitution of the United States. The decision of the Orphans' Court of Philadelphia, which was affirmed per curiam by the Supreme Court of Pennsylvania did not deny any rights of petitioner by the application or construction of any state statute.

Petitioner was removed as trustee of the Estate of George W. Rentschler, Deceased, by virtue of the exercise of inherent chancery powers of the Orphans' Court which are ancillary to and in aid of the Pennsylvania statutes applicable to this matter.

Sections 331 and 921 of the Pennsylvania Fiduciaries Act of 1949, Act of April 18, P. L. 512, Art. IX, 20 P. S. 320.920 et seq. cited by the Orphans' Court in support of its decision, were not drawn in question on the ground of repugnance to the Constitution of the United States, and there was no decision regarding the constitutionality of that act. Hence no statute is at issue before this court.

QUESTIONS PRESENTED.

1. Whether a substantial federal question is presented warranting the grant by this Court of a petition for a writ of certiorari under 28 USC 1257(3), where a State Court, pursuant to its historic chancery powers, removed an attorney as a testamentary trustee of an estate after a full trial of the matter on the basis of substantial evidence which established the following facts:

(a) Breaches of trust by petitioner in other estates in which he was acting in a fiduciary capacity,

(b) Failure by petitioner to meet the standards required of fiduciaries under the law of Pennsylvania,

(c) Dereliction in the administration of the estate in question coupled with implacable hostility toward the cestui que trust who was the sole lifetime beneficiary under the trust and co-trustee with petitioner, and

(d) Jeopardy to the entire trust estate if petitioner were permitted to remain in a fiduciary capacity.

2. Whether petitioner has specifically set up or claimed a violation of the Fourteenth Amendment to the Constitution of the United States which warrants the grant by this Court of a petition for a writ of certiorari, in view of the fact that no statutory, constitutional or other federal claim was ever raised in the Orphans' Court of Philadelphia at any stage of the proceedings, or in the Supreme Court of Pennsylvania until Petitioner filed a motion for reargument after that Court had ruled against him by affirming the action of the Orphans' Court removing him as trustee of the estate.

3. Whether petitioner has drawn in question any statute which is repugnant to the Constitution of the United States warranting the grant by this court of a petition for writ of certiorari under 28 USC 1257(3).

CONSTITUTIONAL PROVISION INVOLVED.

Respondent denies that the record before this Court presents any federal question under the Fourteenth Amendment to the Constitution of the United States which confers jurisdiction upon this Court to grant the writ of certiorari.

STATEMENT OF THE CASE.

1. History of the Action in the Orphans' Court of Philadelphia and in the Supreme Court of Pennsylvania.

The matter is before this Court on the petition for a writ of certiorari by Harry J. Alker, Jr., seeking a reversal of the actions of the Orphans' Court of Philadelphia and the Supreme Court of Pennsylvania whereby he was removed as executor and trustee of the Estate of George W. Rentschler.

The origin of the instant case is found in a petition filed by Wilhelmina L. Rentschler with the Orphans' Court of Philadelphia, seeking the removal of Harry J. Alker, Jr. as testamentary trustee of the Estate of George W. Rentschler. Wilhelmina L. Rentschler is the daughter of decedent, who was the settlor of the trust, and is the sole lifetime beneficiary of her father's estate. In addition, she serves as co-trustee and co-executor of the estate pursuant to the terms of his will. The chronology of events which led to the filing of the petition and to the affirmance, first, by the six (6) judges of the Orphans' Court of Philadelphia and later by the Pennsylvania Supreme Court, of the order entered by the Honorable Harold J. Saylor removing petitioner as trustee is as follows:

George W. Rentschler died on November 14, 1954, leaving a will dated November 20, 1947 under which the entire residue of his estate was to be placed in trust for the benefit of his daughter, Wilhelmina L. Rentschler during her lifetime.

Letters testamentary were granted on December 1, 1954 to Wilhelmina L. Rentschler and to Petitioner, Harry J. Alker, Jr. The corporate fiduciary which was named under the will refused to serve and renounced the appointment because of a dispute it was having in another estate with petitioner (R. 88a). Petitioner conducted the affairs of the estate for seventeen (17) months without a corporate

fiduciary despite the clear mandate in Paragraph Sixth of the will providing that at all times there shall be three executors and three trustees, two of whom shall be individuals and one of which shall be corporate. The absence of a corporate fiduciary was concealed by Alker from Miss Rentschler, who petitioned the Orphans' Court of Philadelphia for the appointment of a corporate fiduciary on April 30, 1956 when she first discovered this fact.

Shortly thereafter an account was filed by petitioner, who was then serving as attorney for the estate. This account of October 3, 1956 revealed a residuary estate of approximately $125,000.00, which is to be augmented by an award of approximately $750,000.00 from the estate of decedent's brother, Henry C. Rentschler. The total estate will be under the control of the trustees.

On October 25, 1956, Wilhelmina Rentschler filed a petition for Harry J. Alker's removal as executor and trustee of the estate. On March 7, 1957, after a full hearing and trial of the issues raised by Wilhelmina Rentschler's petition and petitioner's answer, the hearing judge filed his opinion and decree ordering the removal of Harry J. Alker, Jr. as co-executor and co-trustee of the estate. Petitioner then filed exceptions to this opinion and order and argument was had before the six (6) judges of the Orphans' Court sitting en banc. On May 10, 1957 the Orphans' Court filed its unanimous opinion affirming the action of the trial judge and entered its decree dismissing the exceptions.

Thereafter petitioner appealed to the Supreme Court of Pennsylvania which rendered its per curiam opinion affirming the Orphans' Court on March 17, 1958 after hearing oral argument and considering the written briefs submitted by the parties. Thereafter petitioner filed his motion for reargument, which petition was denied in a per curiam order of the Supreme Court of Pennsylvania dated April 15, 1958. The petition for writ of certiorari was then filed with this court on July 15, 1958.

2. Analysis of the Testimony and Decision of the Orphans' Court.

A. Contents of Will and Record of Petitioner's Derelictions in the Rentschler Estate.

Testator's will, which was drafted by petitioner, in his capacity as decedent's attorney, provides in pertinent part as follows:

Paragraph Third states that the trustees thereafter named are, inter alia, "to hold, invest and re-invest the same, and keep the same invested and collect income therefrom *and after deducting the expenses of the trust pay the net income to, or in the discretion of the trustees apply the same to the maintenance and support of my daughter, Wilhelmina L. Rentschler, for and during the term of her Natural life.*" (Emphasis supplied.) Paragraph Fifth of the will nominates testator's daughter, Wilhelmina L. Rentschler, Harry J. Alker, and Girard Trust Company as executors and trustees. Paragraph Sixth, a crucial clause in the determination of the case, states the following:

> "Sixth. I further order and direct that at all times there shall be three executors and three trustees of this, My Last Will and Testament—one corporate and two individual. Each of the original individual executors and each of the original individual trustees shall have the right to nominate his or her successor by his or her will or otherwise, and each succeeding individual successor and each succeeding trustee shall have the right to so nominate his or her successor."

Paragraph Ninth gives the trustees the broadest possible powers, including the right to invest and reinvest without restriction to legal investments and otherwise to buy and sell property if they deem it advisable.

At the hearing it was developed that from the very outset of the administration of this estate petitioner had committed a most serious breach of trust by his flagrant

disregard of the express mandate of Paragraph Sixth of the will, which he had drafted at testator's behest. Not only did he operate without a corporate fiduciary as co-executor during the first seventeen (17) months of administration of the estate, but he concealed this fact from Wilhemina L. Rentschler, his co-trustee and the sole beneficiary under the estate.

At the hearing Wilhemina Rentschler testified that petitioner's dilatory, evasive and hostile conduct not only led her to lose faith in him completely, but also deprived her of her rights as a co-executor. He continually refused to inform her of important actions relating to the estate and otherwise acted in such a manner as to make participation in decisions affecting the estate an impossibility.

Under searching examination by the trial judge, Miss Rentschler stated that his actions had created a situation which made cooperation with him unfeasible. The hostility between petitioner and Miss Rentschler not only affected her in her fiduciary capacity, but also threatened her rights as a beneficiary of the estate. Paragraph Third of the will permits the trustees to control her maintenance in all material respects, including distribution of income. Implacable hostility between trustee and cestui que trust in view of such broad powers could well defeat the dominant purpos for which the trust was established. Hence the Court concluded that the lack of harmonious relations was such as to put the estate in jeopardy, and in line with principles firmly imbedded in the common law of Pennsylvania, held that sufficient evidence had been produced to warrant petitioner's removal on that ground alone. (Opinion of Honorable Harold J. Saylor of Orphans' Court of Philadelphia, R. 168a-171a inclusive.)

Petitioner's statement in his brief to the Court that Miss Rentschler could cite no dereliction is flatly contradicted by the record and by the findings of the trial judge. His failure to explain estate matters, to permit her to participate in decisions and his deception regarding the ab-

sence of a corporate fiduciary were serious breaches of trust under Pennsylvania law. The trial court found as a fact that an inharmonious relationship existed which was detrimental to the estate. In determining this issue the Orphans' Court said the following:

> "As was said by the late Justice Maxey in Hodgson's Estate, 342 Pa. 250, 267, 20 A. 2d 294 (1941):"
>
> 'When a court is called upon to remove a trustee, the question in each case is whether the circumstances are such that the continuance of the trustee in office would be detrimental to the trust. Scott on Trusts, Sec. 107.'
>
> "The court there cited Marsden's Estate, 166 Pa. 213, 31 Atl. 46 (1895) where it had held that the power of the court to remove a trustee 'is not dependent upon the misconduct of the trustee sought to be superseded; and it is enough to show that his retention, by the existence of hostile relations between him and the cestui que trust, would materially work disadvantage, inconvenience and great discomfort to the latter.'
>
> "In Hodgson's Estate, supra, the trustee was removed.
>
> "In Corr Estate, 358 Pa. 591, 598, 58 A. 2d 347 (1948), the court sustained the action of our court in removing a testamentary trustee. In its opinion the Supreme Court at page 598, cited Hodgson's Estate, supra, where it quoted its opinion in Price's Estate, 209 Pa. 210, 212, 58 Atl. 280 (1904):
>
> "'While inharmonious relations between trustee and cestui que trust, not altogether the fault of the former, will not generally be considered a sufficient cause for removal, yet where they have reached so acrimonious out a condition as to make any personal intercourse impossible and to hinder the proper transaction of

business between the parties, a due regard for the interests of the estate and the rights of the cestui que trust may require a chance of trustee.' (R. 168a & 169a) . . .

"'While there is a distinction between cases involving a court-appointed trustee and those involving the removal of a testamentary trustee, there can be no question that the Orphans' Court may in any case properly remove one in whom the life tenant of the trust has lost all confidence because of past experience, whether or not the testator named him as trustee. That respondent possessed the father's confidence does not mean the daughter must continue with a trustee she does not trust; certainly when there is in the record evidence of conviction of crime and of charges by estate beneficiarres of unprofessional conduct resulting in proceedings for disciplinary action against such trustee." (R. 170a)

B Derelictions in Other Estates and Evidence of Lack of Fiduciary Capacity.

In addition, the Court received in evidence the adjudication of an Orphans' Court judge of Montgomery County, Pennsylvania, in the Estate of Winfred S. Hurst, in which estate petitioner was originally surcharged in the amount of $130,000.00 by the Court and removed as trustee for his lack of fitness. This decree was later amended in view of the fact that petitioner repaid $30,000.00 to the estate and withdrew as executor and trustee.

A related case was the estate of Annie S. Hurst, in which petitioner was also removed as trustee, but later reinstated because of the appointment of a corporate fiduciary which was to have complete control of the assets.

Petitioner, in his statement of facts to this Court, states that the settlement in these two estates exonerates him of any blame. A review of the record and evidence in-

dicated that he was removed as trustee in the Winfred S. Hurst estate after he repaid the estate the sum of $30,000.00, and that he was permitted to continue as trustee in the Estate of Annie S. Hurst only after a corporate fiduciary consented to serve with him.

Petitioner was fully confronted with the evidence and had the right of cross-examination and rebuttal. No evidence was offered by petitioner to explain the record in the Hurst cases or in any way to mitigate or rebut the facts of those cases. The record in this case, which consists of petitioner's Exhibits 1 through 6 inclusive (R. 106a-134a) and respondent's Exhibits B through E inclusive (R. 137a-156a) as well as Judge Saylor's discussion of the issue (R. 161a-164a) amply support the Court's findings that as a matter of Pennsylvania law enough credible evidence was produced to justify petitioner's removal as a trustee of an estate on the grounds of jeopardy.

The trial judge's holding on this score was adopted by the Orphans' Court en banc and the Supreme Court. In explaining the weight to be given this factor he said:

> "That Judge Van Roden on April 12, 1956 removed Alker 'for the sole purpose of expediting the conclusion of the matters which are still outstanding in this estate' and not 'by reason of any dereliction of duty of any sort' does not deter us from giving careful consideration to the circumstances which brought about the conclusions of the judge set forth in the adjudication. Moreover, Judge Van Roden's removal of Alker as trustee for the decedent's mother's trust on April 17, 1956 (five days later) on representations that Alker 'was neither fit, competent nor qualified to act as trustee', was in our opinion not wholly undone by his decree of July 13, 1956 revoking the decree of April 17, 1956 and appointing a corporate trustee to serve with Alker as continuing trustee." (R. 166a)

Judge Saylor also had before him the record of Alker's improper conduct as estate counsel in the case of Emily H. Shekerjian. In that case a sub-committee of the Committee of Censors held hearings on the complaint and answer on November 5 and 17, and December 1 and 8 of 1956. As a result of their report, the Committee of Censors filed a formal petition with the Prothonotary of Court of Common Pleas No. 5 of Philadelphia County. A rule on Alker to show cause why he should not be disciplined for improper conduct was ordered on February 1, 1957. An answer was filed on or about February 20, 1957. The Committee of Censors reported that Alker's conduct was in violation of the Canons of Ethics in that he misappropriated funds, made unauthorized investments and was not only evasive and uncooperative before the Committee, but had been contemptuous toward his client.

In addition, the Court had before it the record of conviction for federal income tax evasion by petitioner for which he was under sentence of one year and a day, as well as indictments for evasion of federal estate taxes in his fiduciary capacity in the Hurst estate. His subsequent conviction in that case resulted in an affirmance of conviction on one count by the United States Court of Appeals for the Third Circuit. Petitioner had also sought the grant of a writ of certiorari in that matter which is still pending before this Court.

In his brief before this Court, petitioner urges the grant of the writ on the ground that he was improperly removed because of these diverse convictions and citations which were not finally adjudicated at the time. In addition, he urges that there was no showing of ill health or lack of fitness on his part to serve as a fiduciary.

Both points can be disposed of quickly. Originally the petition was brought, partly on the basis of his inability to serve because of ill health and lack of emotional and mental fitness. This stemmed from his own plea in the District Court of the United States in the criminal case for

personal income tax evasion bearing indictment No. 18306. There he obtained a stay of proceedings on the testimony of his doctor. However, at the trial of this issue, respondent readily conceded that its cause did not rest on his lack of physical fitness and the Court specifically held that the basis of removal was jeopardy to the estate and not petitioner's mental, physical or emotional state. His argument to this Court is refuted in the record (R. 166a under Discussion).

Moreover it is also clear from the law of Pennsylvania as applied by the Orphans' Court and the Supreme Court of Pennsylvania that the Court not only was justified but was duty bound to consider evidence which would indicate whether the continuance in office of a trustee would jeopardize the estate. The question is one of jeopardy and not surcharge. Thus, under Pennsylvania law evidence bearing upon a trustee's character is germane and relevant. The Court in its opinion adopted Section 107 of the Restatement of Trusts which states the following:

"Section 107. Removal of Trustee:

A trustee can be removed.

(a) by a proper court; or

(b) by the person, if any, who by the terms of the trust is authorized to remove the trustee.

Comment on Clause (a):

a. Removal by Court: A court may remove a trustee if his continuing to act as trustee would be detrimental to the interests of the beneficiary. The matter is one for the exercise of a reasonable discretion by the court.

b. Grounds for Removal: The following are, among others, grounds for removal of a trustee: lack of capacity to administer the trust (see Sec. 89); the commission of a serious breach of trust; refusal to give a bond, if a bond is required;

> refusal to account; the commission of a crime, particularly one involving dishonesty; unfitness, whether due to old age, habitual drunkenness, want of ability or other cause, permanent or long-continued absence from the State; the showing of favoritism to one or more beneficiaries; unreasonable or corrupt failure to cooperate with his co-trustee. * * *"

Moreover the Court also adhered to the principles set forth in Estate of *James & Hannah Wood*, 41 P. L. J. 222 (1894). There the Court stated:

> "Whatever may throw light on the character of the trustee is material, and consequently all facts within the knowledge of the court derived from cases within its jurisdiction must have an important bearing. . . .
>
> "So, too, is it immaterial that no loss has resulted from some of the acts complained of. The question is not of surcharge but of jeopardy. The purpose of the jurisdiction is to prevent loss from prohibited risks; and if a trustee shows a disposition to indulge in them the prudent course is to deprive him of the opportunity by removing him. While one risk assumed may by a lucky chance be justified by its successful issue, others may bring disaster. The rules established for the administration of trusts wisely, therefore, forbid the assumption of unnecessary risks. The safety of the trust estates require rigid adherence to these rules."

The Orphans' Court clearly held that its action was not based merely on the fact of criminal conviction, but that the cumulative effect of these deviations, surcharges, settlements and disciplinary proceedings was such as to render him unfit to serve in a fiduciary capacity. Judge Saylor stated the following:

"There is far too much evidence of dilatory, careless and questionable conduct on the part of Alker in handling estates, as fiduciary or as counsel, in the record before this court to accept past performance in either capacity as any warranty that as a co-trustee in the Rentschler Estate he would serve with satisfaction to the life tenant, to the co-trustees or to the court which has jurisdiction over the estate.

"A trustee must be one who is trusted. Lack of diligence in performance of duty, absence of candor in dealing with parties having an interest in an estate, refusal to keep them informed as to the statues thereof, failure to handle assets of the estate with complete devotion to its welfare, inability to act at all times with sincerity and conscientious devotion to the office — these are traits which inevitably create loss of confidence of those for whom one is acting in a fiduciary capacity. . . .

"Criminal charges against the respondent which have resulted in his conviction, the pendency of additional criminal charges and of the two proceedings for disciplinary action against the respondent as an attorney, and the circumstances of the case require such action by this court as will assure the protection of the trust property involved and the termination of the hostile relationship existing between the respondent and the life tenant. This calls for the removal of the respondent as co-trustee."

The Orphans' Court accordingly entered its order removing petitioner as trustee. It is this order and its subsequent affirmance by the Pennsylvania Supreme Court which petitioner seeks to have reversed by this Court.

ARGUMENT.

I. Petitioner Cannot Invoke the Jurisdiction of This Court by Certiorari.

A. Petitioner Failed to Raise the Issue of the Alleged Violation of the Fourteenth Amendment to the Constitution of the United States Properly in the Courts of Pennsylvania.

This is not a case for certiorari substantively or procedurally. Apart from the fact that no substantial federal question is involved, petitioner has failed to raise the alleged violation of the Fourteenth Amendment to the Constitution of the United States properly in accordance with the law of Pennsylvania.

It is axiomatic that this Court will not take jurisdiction either by way of an appeal or by the grant of a writ of certiorari if the federal question has not been asserted in the State courts ". . . at the proper time and in the proper manner by pleading, motion or other appropriate action under the State system of pleading and practice . . . and upon the question whether or not such a claim has been so asserted, the decision of the State Court is binding upon (the Supreme Court) when it is clear . . . that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." *Hartford Life Insurance Co. v. Johnson*, 249 U. S. 490, 493, 39 S. Ct. 336, 63 L. Ed. 722 (1919).

In his brief petitioner attempts to bring his case within the confines of this rule by asserting that the federal question was raised before the Supreme Court of Pennsylvania (Petitioner's Brief, Page 5).

It is noteworthy that the federal question was not raised at any stage of the proceedings in the trial court and in fact was not raised in the Supreme Court of Pennsylvania prior to petitioner's motion for reargument after

that Court had rendered its per curiam opinion affirming the action of the Orphans' Court of Philadelphia.

It is clear under Pennsylvania law that the Pennsylvania Supreme Court need not and will not consider constitutional questions not properly presented to the trial court. See *Williams v. Masters, Mates & Pilots*, 384 Pa. 413, 421, 120 A. 2d 896, 900 (1956); *Bourd v. Berman*, 359 Pa. 183, 185, 58 A. 2d 442, 444 (1948); *Montgomery County Bar Association v. Renalducci*, 329 Pa. 296, 197 Atl. 924 (1938); *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A. 2d 911 (1956); and other cases cited in respondent's answer to petitioner's motion for reargument filed with the Supreme Court of Pennsylvania, which is "Appendix B" to this brief.

In view of the untimely presentation of this question to the Pennsylvania Courts, this Court should deny the petition for lack of jurisdiction. *Bailey v. Anderson*, 326 U. S. 203, 206-207, 66 S. Ct. 66, 90 L. Ed. 3 (1945); *Robertson and Kirkham, Jurisdiction of the Supreme Court of the U. S.*, (1951 Ed.) § 66.

B. No Pennsylvania Statute Was Drawn in Question on the Grounds of Its Repugnance to the Constitution of the United States at Any Stage of the Proceedings.

Petitioner attempts to assert for the first time in this Court that he was deprived of his rights under the Fourteenth Amendment because of the trial court's alleged failure "to apply the plain meaning of the Fiduciaries Act of 1949 to the instant case" (Petitioner's Brief, Page 6).

It is noteworthy that this particular issue was not raised at any stage of the proceeding, indeed not even in petitioner's motion for reargument before the Supreme Court of Pennsylvania.

The Pennsylvania cases heretofore cited make it equally clear that a constitutional question involving an alleged

violation by the application of a state statute must also be raised in the trial court.

Hence under the doctrine of *Bailey v. Anderson, supra,* this Court should dismiss the action for lack of jurisdiction, because the alleged unconstitutional application of the Fiduciaries Act of 1949, *supra,* was not properly raised in accordance with the law of Pennsylvania.

Petitioner's claim which is made for the first time before this Court is not only untimely, but ill-founded since nothing in the decision of the Orphans' Court of Philadelphia or in the per curiam decision of the Supreme Court of Pennsylvania involved any ruling on the constitutional validity of the Fiduciaries Act of 1949, *supra.* Indeed no such ruling was necessary to the decision. The Fiduciaries Act of 1949, *supra,* sets forth certain grounds for removal of a trustee, but it is manifestly clear from the decision of the Orphans' Court of Philadelphia and from the Pennsylvania cases cited therein that the courts of Pennsylvania exercise inherent chancery powers in the realm of trusts, and that the Fiduciaries Act merely stakes out certain broad general principles which are then applied in accordance with the common law.

Had there been any doubt about this issue prior to the decision of the Supreme Court of Pennsylvania in the *Girard College* case, 391 Pa. 434, 135 A. 2d 757 (1958), it was dispelled by that decision and by the subsequent denial of the petition for writ of certiorari and dismissal of the appeal in the case of *Commonwealth of Pennsylvania, et al. v. Board of Directors of City Trusts of the City of Philadelphia and 13 Substituted Trustees of the Estate of Stephen Girard, Deceased* (Oct. Term 1957, No. 947 in the Supreme Court of the U. S.).

II. No Substantial Federal Question Is Presented Which Would Warrant the Grant of Certiorari.

A. The Decision of the Pennsylvania Supreme Court Was Made on the Basis of State Law and Rests Upon a Fair and Substantial Basis Which Should Be Accepted by This Court.

Even a cursory examination of petitioner's brief reveals that no substantial federal question is presented. Indeed the gist of his argument is that the Pennsylvania Court misapplied the law of Pennsylvania in making its determination. In order to view this question in proper perspective, the questions of state law which were decided by the Orphans' Court of Philadelphia and affirmed by the Pennsylvania Supreme Court per curiam must be examined. Such an examination clearly demonstrates that no constitutional questions were involved and that the decision is a fair and proper one which is consistent with the principles governing fiduciary relationships that have been evolved by the courts of Pennsylvania.

This Court has stated many times that it will accept the state law announced by the state court unless it is made to evade a constitutional issue or is without a fair or substantial basis. In *Broad River Power Co. v. South Carolina*, 281 U. S. 537, 540, 50 S. Ct. 40, 74 L. Ed. 1023, aff'd. rehearing 282 U. S. 187, 51 S. Ct. 94, 75 L. Ed. 287 (1930), the Court said:

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. * * * But if there is no evasion of the

constitutional issue, * * *; and the non-federal ground of decision has fair support, * * * this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."

Moreover, it is abundantly clear that where the decision of the state court rests upon a non-federal ground which independently and adequately supports the state court judgment, the Supreme Court will not exercise jurisdiction to review the case, notwithstanding the fact that federal questions were raised on the state court record or that the state court decided these questions. See *Robertson and Kirkham, Jurisdiction of the Supreme Court of the U. S.*, § 89; *Herb v. Pitcairn*, 324 U. S. 117, 125-126, 65 S. Ct. 459, 89 L. Ed. 789 (1945).

A fortiori when, as in the instant case, no federal question was ever raised by petitioner or decided by the State court, this Court will not disturb the judgment which is supported on independent and adequate state grounds.

The Opinion of the Orphans' Court is replete with decisions which indicate the exclusive Pennsylvania grounds upon which the court acted.[1] These cases stand for the proposition that in the exercise of its inherent chancery powers the Court may remove a fiduciary on the basis of competent evidence which reveals jeopardy to the estate if he remains as trustee. Petitioner misconstrues the gist of the entire action. It is not necessary that there be a final conviction of a crime or proof of peculations. It is

1. *Bell's Estate*, (Nos. 1 and 2) 44 Pa. Sup. 60 and 62 (1910); *Com. to Use v. Allen*, 254 Pa. 474, 98 Atl. 1056 (1916); *Corr Estate*, 358 Pa. 591, 58 A. 2d 347 (1948); *Crawford's Estate*, 340 Pa. 187, 16 A. 2d 521 (1940); *Estate of James and Hannah Wood*, 41 P. L. J. 222 (1894); *Fleming's Estate*, 135 Pa. Supa 423, 5 A. 2d 597 (1939); *Friese's Estate*, 317 Pa. 89, 176 Atl. 223 (1934); *Hodgson's Estate*, 342 Pa. 250, 20 A. 2d 294 (1941); *Hoover's Estate*, 63 D. & C. 517 (1948); *Jacob Altemus*, 1 Ash. 49 (1823); *Myers Estate*, 205 Pa. 413, 54 Atl. 1093 (1939); *Perrett's Estate*, 14 Pa. Sup. 611 (1900); *Piper's Appeal*, 20 Pa. 67 (1852).

enough that the actions of the fiduciary both in the estate in question, and in other matters indicate that it would be safer if he did not act as trustee.

Petitioner was accorded a full hearing and had the right to cross-examine witnesses produced by respondent and the right of rebuttal. Not an iota of evidence was introduced in the record to refute the evidence presented against him, and the Orphans' Court as the finder of fact was justified in ruling as it did.

Moreover, the Orphans' Court has complete power and jurisdiction to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed. See *Girard Will* case, *supra*. This point was also inherent in the case of *Commonwealth of Pennsylvania et al. v. Board of Directors of City Trusts, supra*, in which this Court dismissed an appeal and denied certiorari to appellants who were seeking to have the removal of the Board of City Trusts as Trustees of the Estate of Stephen Girard by the Pennsylvania courts reversed.

The opinion of Judge Saylor makes it manifestly clear that each of the factors he discussed would have been sufficient in and of itself to justify removal. Thus, even if the evidence of criminal convictions, pending disbarment proceedings and surcharges in other cases, which were certainly admissible for the purpose of determining jeopardy, were stripped from the case, the findings by the Orphans' Court that the cestui que trust no longer could enjoy harmonious relations with the petitioner because of his derelictions in this estate would be adequate and sufficient under Pennsylvania law to sustain the removal. See *Corr Estate*, 358 Pa. 591, 58 A. 2d 347 (1948); *Hodgson's Estate*, 342 Pa. 250, 267, 20 A. 2d 294 (1941). Moreover, under the law of Pennsylvania the action of the trial court cannot be reversed unless there is a manifest abuse of discretion; findings of fact of the trial court are deemed controlling in cases of this nature. See *Piper's Appeal*, 20 Pa. 67 (1852); *Perrett's Estate*, 14 Pa. Super. 611 (1900); and *Bell's Estate*, (Nos. 1 & 2) 44 Pa. Sup. 60 & 62

(1910). Since the evidence furnishes adequate grounds for removal under Pennsylvania law and since the findings of fact of the Orphans' Court were not disturbed on appeal, the decision should not be disturbed by this Court because it is based upon independent and adequate state grounds which are sound and substantial. What this Court said in *Herb v. Pitcairn*, 324 U. S. 117, 125-126, 65 S. Ct. 459, 89 L. Ed. 789 (1945), is wholly applicable here:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds * * *. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our jurisdiction. Our only power over state judgments is to correct them to the extent that they inaccurately adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion."

CONCLUSION.

Respondent respectfully submits that the petition for certiorari be denied and that this Court refuse to take jurisdiction of the matter because no substantial federal question is presented. Apart from the fact that petitioner did not raise any constitutional questions in the trial court in Pennsylvaina or in the Pennsylvania Supreme Court until his motion for reargument was filed, there is no basis either substantively or procedurally for his claim that he has been denied due process of law.

He was afforded a hearing and was represented by counsel at every step of the proceeding. Moreover, the basis for his removal stemmed from his own derelictions and conduct, all of which were actions which justified his removal under the law of Pennsylvania.

By failing to raise the constitutional issues in accordance with the practice and procedure delineated by the Supreme Court of Pennsylvania, he is foreclosed from raising these issues in this Court. In addition, the decisions of the Orphans' Court of Philadelphia and of the Supreme Court of Pennsylvania rest on a fair and substantial state basis which should not be disturbed by this Court.

Respectfully submitted,

DAVID F. MAXWELL,
Attorney for Respondent.

OBERMAYER, REBMANN, MAXWELL & HIPPEL,
Of Counsel.

APPENDIX A.

OPINION OF THE COURT.

(Filed March 17, 1958)

PER CURIAM.

Decree affirmed at appellant's costs on the able opinion of the hearing judge whose comprehensive findings are fully supported by the evidence, were confirmed by the court en banc on exceptions thereto and well justify the legal conclusions which produced the final decree.

ORDER OF THE COURT.

April 15, 1958, petition denied.

PER CURIAM.

APPENDIX B.

IN THE
SUPREME COURT OF PENNSYLVANIA
FOR THE EASTERN DISTRICT

No. 305. JANUARY TERM, 1957.

ESTATE OF GEORGE W. RENTSCHLER, DEC'D.

ANSWER TO PETITION FOR REARGUMENT.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

Wilhelmina L. Rentschler, trustee and beneficiary under the will of George W. Rentschler files this answer in opposition to the Petition for Reargument filed by Frank F. Truscott, Esq. on behalf of Harry J. Alker, Jr., and assigns the following reasons therefor:

1. Petitioner cannot raise the issue of deprivation of property in contravention of the Fourteenth Amendment of the Constitution of the United States and of Article I, Section 9 of the Constitution of the Commonwealth of Pennsylvania at this time because he failed to raise these constitutional questions in the court below. See *Montgomery County Bar Association v. Rinalducci*, 329 Pa. 296 (1938); *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507 (1956). Moreover, the claim is without merit because petitioner was afforded substantive and procedural due process at every stage of these proceedings both in the court below and in this court. Under the law of Pennsylvania, the Orphans' Court has the right to remove a trustee for cause, all of

which was adequately covered by the findings, conclusions and supporting opinion of the Honorable Harold Saylor, the auditing judge.

2. Petitioner's argument that no evidence was produced which indicated the estate is in jeopardy was thoroughly considered and then rejected both by Judge Saylor and by the Orphans' Court en banc. Although this argument has been covered exhaustively both by the court below and in appellee's brief, it might be noted that petitioner did not administer the estate competently. Because of his derelictions a deficiency assessment of approximately $200,000 has been levied against the estate by the Internal Revenue Service. See Appellee's brief, pages 15-17.

Our courts have consistently held that the removal of a trustee is justified if there is sufficient evidence of his character to indicate that he is the kind of person whose continuance in office might harm the estate in the future. The issue is not one of surcharge where actual loss must be shown but one of jeopardy. See *Estate of James and Hanna Wood*, 41 P. L. J. 222 and Appellee's brief, pages 25-29.

3. Petitioner argued the effect of his conviction for income tax evasion at great length both in the court below and in this court. It suffices to say that both in *Friese's Estate*, 317 Pa. 86 (1934) and in *Commonwealth To Use v. Allen*, 254 Pa. 474 (1916), this court has held that a trustee may be removed for conviction of crime in a matter not directly connected with the trust itself. Judge Saylor properly applied the Pennsylvania law which entitles a court to remove a trustee if his conduct, his moral character and surrounding circumstances demonstrate the lack of fitness. See Conclusions of Law entered, Record 169a, *Corr's Estate*, 358 Pa. 591 (1948), also *Fleming Estate*, 135 Pa. 423 (1939) and Appellee's brief, pages 24, 25.

Moreover, Appellant has failed to refute the impact of these convictions at every stage of these proceedings. In the court below he had ample opportunity to explain or otherwise attempt to mitigate the record facts of conviction for income tax evasion and misappropriation of funds from an estate of which he was trustee. Yet he offered no evidence at all in support of his position.

4. Appellant's fourth point regarding the surcharge procedures in the Hurst Estate also was argued at length and thoroughly considered by the court below. He attempts to renew his argument that the Orphans' Court misconstrued certain actions of Judge Van Roden. The Orphans' Court considered the effect of the removal in its proper light when it said the following:

> "The language in the original adjudication of June 1955 indicates lack of confidence in the executor who was found to be 'unfit to represent and protect the interests of the beneficiaries' and to represent their interests in tax matters."
>
> "That Judge Van Roden on April 12, 1956 removed Alker 'for the sole purpose of expediting the conclusion of the matters which are still outstanding in this estate' and not 'by reason of any dereliction of duty of any sort' does not deter us from giving careful consideration to the circumstances which brought about the conclusions of the judge set forth in the adjudication. Moreover, Judge Van Roden's removal of Alker as trustee for the decedent's mother's trust on April 17, 1956 (five days later) on representations that Alker 'was neither fit, competent nor qualified to act as trustee', was in our opinion not wholly undone by his decree of July 13, 1956 revoking the decree of April 17, 1956 and appointing a corporate trustee to serve with Alker as continuing trustee."

5. Appellant's fifth reason also has been argued at length and was properly rejected by the court below and by this court. The point goes to the effect of the disciplinary action pending before the Montgomery Bar Association growing out of the Hurst Estate, the very estate which was the subject of Judge Van Roden's surcharge proceedings and was the basis for Alker's conviction in United States District Court for income tax evasion in his capacity as trustee. Indeed the evidence is that he misappropriated $30,000 for his own use. The Bar Association of Montgovery County very properly considered this as a cause for disbarment. The court did not base its opinion upon the fact that there were these disciplinary proceedings. To the contrary, it stated the following:

> "There has not been brought to our attention any evidence as to the purpose of the action of the Montgomer County Bar's Board of Censors. However, there is sufficient evidence before us on the subject of respondent's conduct as executor of the Hurst Estate and the action thereon taken by the auditing judge to enable this court to determine whether or not he was justified in removing Alker as executor."

6. The objection to the Orphans' Court consideration of the disbarment proceedings before the Philadelphia County Bar Association falls in the same category. The Court did not consider the proceedings per se but considered the record facts involving one Emily H. Shekerjian which were never refuted or denied at the hearing by Alker. The Shekerjian case indicates professional misconduct on Alker's part by misappropriation of funds, unauthorized investments and failure to maintain proper records. In *Fleming Estate,* 135 Superior 143 (1939), the Superior Court removed a trustee on the grounds inter alia, the proceedings in equity were then pending to restrain him from practicing law. The latter case is a clear precedent for the

court considering the disbarment proceedings as one factor in its decision.

7. Petitioner's seventh reason for reargument is not sufficient in fact or law to support his motion. The United States Court of Appeals has taken the entire case under advisement. Moreover, the argument relating to the invalidity of counts two and three in the indictment covering willful and fraudulent evasion in the Hurst Estate are highly technical arguments which do not go to the merits of the case but turn on the question of the propriety of basing those counts on the sections of the code under which they were brought.

Count one which is still being vigorously pressed by the government contains the gist of the case with respect to moral turpitude. That count upon which Alker was convicted and sentenced reads as follows:

> "That on or about the 5th day of February, 1951, in the Eastern District of Pennsylvania, Harry J. Alker, Jr., the defendant herein, who was the duly appointed Executor of the Will of Winfred S. Hurst, deceased, did wilfully and knowingly attempt to evade and defeat a large part of the taxes imposed upon the Estate of said Winfred S. Hurst, deceased, and due and owing the United States of America under and by the provisions of the law known as the Federal Estate Tax, by filing and causing to be filed with the Collector of Internal Revenue at Philadelphia, in said District, a false and fraudulent Estate Tax Return wherein he stated that the cash on hand belonging to said decedent was the sum of $3,046.93, whereas, as he then and there well knew, the correct sum of such cash on hand was $38,046.93, and upon which understated and reported cash of $35,000.00, as the defendant then and there well knew, there was imposed by law and due and owing to the United States of America a tax of $9,904.91."

"In violation of Section § 894(b)(2)(C) of the Internal Revenue Code of 1939, 26 U.S.C., § 894(b)(2)(C)."

Moreover, petitioner's conviction for willful evasion and fraud in the matter of his personal income tax remains unassailed. The basis for the Orphans' Court action, however, does not depend upon the technicalities of Petitioner's maneuvers in the appeals of these convictions, for he did not even attempt to produce evidence before the Orphans' Court which would explain or mitigate the impact of these convictions. Judge Bolger's statement for the court en banc correctly reflects the proper standard which the Orphans' Court was entitled to use:

"Motions for new trial and for judgment in the defendant's favor are pending in the Federal Courts. That does not mean that we must ignore the full implications of the verdicts of guilty. In those cases the character of the trials, of the issues which involve the burden of proof and the presumption of innocence are not applicable here. The suggestion that those proceedings are legally inconclusive does not eliminate from our consideration the facts in those cases. The entire situation insofar as we are concerned involves more than suspicion, conjecture and smoke and we are entirely satisfied that the findings of fact by the hearing judge are clearly supported. The time for us to act is now, while the assets of this estate are in this respondent's possession (even though in a qualified degree). He has all of the manifold possibilities at the command of a co-fiduciary to substantially influence administration of the trust and to qualifiedly represent it in its dealings with others. We are not required to wait to bolt the stable door until the horse is gone. It would be fatuous for us to attempt to create at this time all of the necessary safeguards to protect this

estate from the evils which the uncertain future might present."

"We would be derelict in our duty if we refused the relief requested by the life tenant."

8. Petitioner has raised the constitutional question of equal protection of laws for the first time in his Petition for Reargument before this court. None of the pleadings below included this issue and therefore the failure to raise it seasonably bars him from attempting to argue it for the first time at this stage of the proceedings. This court has consistently held that constitutional questions which have not been raised before the court below cannot be raised for the first time on appeal. See *Montgomery County Bar Association v. Rinalcucci, supra* and *Schade v. Allegheny County Inst. Dist., supra.* The court below meticulously documented the reasons for petitioner's removal, paramount among which were his derelictions in this very estate. See Appellee's brief, pages R. 9-31. Judge Saylor's Findings of Facts and Conclusions of Law were amply supported by the evidence.

WHEREFORE, appellee respectfully prays that the Petition for Reargument be dismissed for the reasons herein stated.

Respectfully submitted,

HERBERT A. FOGEL,
DAVID F. MAXWELL,
for OBERMAYER, REBMANN, MAXWELL & HIPPEL.